

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of)	
An Inquiry to Determine Whether There is a		
Need for Commission Rules for the		
)	DOCKET NO. UT-990582

QWEST’S COMMENTS IN RESPONSE TO STAFF’S PROPOSED RULES - CR-102

I. INTRODUCTION

In its initial Comments¹ in this rulemaking, Qwest Corporation (‘Qwest’, *f/k/a* U S WEST Communications) advocated that the Commission refrain from establishing collocation rules because of the plethora of rules governing collocation that already existed at that time. Qwest listed the following rules as evidence that there was sufficient guidance to ensure proper implementation of the collocation mandate envisioned in the Telecommunication Act of 1996.

standards for physical collocation and virtual collocation, FCC’s 1st Report and Order, CC Docket 96-325, § 51.323 (8/96), provisions emanating from Washington Docket Nos. UT-960323, et al., regarding collocation space evaluation criteria (9/98), recently released federal collocation rules, FCC 706 Rules Order, CC Docket

¹ Initial Comments of U S WEST, June, 11, 1999.

98/147 (3/99),
and collocation provisions contained in each of the interconnection agreements.

Since the initiation of this rulemaking, Staff has conducted a thorough evaluation of the necessity for adopting collocation rules, including the review of extensive comments in response to draft rule language proposed by several other parties to this proceeding. Qwest applauds Staff on its thoughtful analysis and generally believes that Staff's Proposed Rules for Collocation (Staff's Rules) represent a reasonable approach to collocation rulemaking in that they establish only limited rules in areas that Staff believes are not addressed by existing rules. Consequently, Qwest will limit its comments to recommended changes to Staff's Rules to ensure that they are realistic requirements with which companies can comply, and that they are consistent with other state and federal rules and statutes.

RECOMMENDED MODIFICATIONS TO STAFF'S PROPOSED RULES

The specific areas in which Qwest recommends modifications to Staff's Rules are: Staff's definition of "collocation"²; the time interval in which the ILEC must complete construction of, and deliver, the ordered collocation space and related facilities³; the time interval in which the ILEC must complete construction of, and deliver, the ordered collocation space and related facilities if extraordinary circumstances exist⁴; the requirement that if the ILEC fails to deliver

² Commission Staff Recommendation, August 9, 2000, page 1, (1)(b) "Collocation" means the ability of a CLEC to place equipment within, upon, or nearby an ILEC's premises."

³ Ibid., page 2, (2)(b) "The ILEC must complete construction of, and deliver, the ordered collocation space and related facilities within forty-five(45) calendar days after the later of the CLEC's acceptance of the written quote or payment of one-half of the nonrecurring charges specified in the quote, except in the case of extraordinary circumstances, as defined in subsection (3)(c) of this section."

⁴ Ibid., page 3, (2)(c) "If extraordinary circumstances exit, the ILEC must complete construction of, and deliver, the ordered collocation space within ninety (90) calendar days of the later of the

the collocation space by the required delivery date, the ILEC must pay liquidated damage to the CLEC at the rate of one-tenth of the NRC for each week beyond the required delivery date⁵; and, the provision which requires the ILEC to petition the Commission to determine that the space requested by the CLEC is not available⁶.

Collocation Definition

The specific language which Qwest proposes be changed in the “Collocation” definition of Staff’s Rules is the part which allows a CLEC to place equipment “. . . ***nearby an ILEC’s premises.***”⁷ (emphasis added) Staff’s proposed language, which suggests that collocation take place at a point beyond the boundary of the ILEC’s premises, is inconsistent with both the FCC’s Order⁸ and the D. C. Circuit Court of Appeals ruling⁹ regarding adjacent collocation. In reviewing the FCC’s Order regarding adjacent collocation, the Appellate Court found, in part:

The rule is also eminently reasonable: adjacent collocation is required only when space in the central offices is exhausted; adjacent collocation may occur only to the extent that it is technically feasible; adjacent collocation is subject to state regulations over zoning, design, and construction parameters; and adjacent collocation is subject to reasonable safety and maintenance requirements. ***And petitioners can find no argument to show***

CLEC’s acceptance of the written quote or payment of one-half of the nonrecurring charges specified in the quote.”

⁵ Ibid., page 3, (2)(e).

⁶ Ibid., page 5, (4)(c).

⁷ Ibid., page 1, (1)(b).

⁸ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999) (Advanced Services Order).

⁹ GTE v. FCC, 205 F. 3d 416 (D.C. Cir., 2000).

*that this is impermissible under § 251(c)(6), for the simple reason that the disputed “adjacent” properties all are on the LECs’ “premises,” which is all that is required by the statute.*¹⁰ (emphasis added)

In its CR-102 recommendation to the Commission, dated August 9, 2000, Staff cites the D.C. Circuit Court of Appeals decision with respect to what Staff characterizes as “two other controversial items -- permitting CLECs to install “used and useful” equipment and the use of collocation space for interconnection with other CLECs.” Apparently because of the Appellate Court’s ruling on these issues, Staff’s position is that “[these issues] do not belong in this rulemaking.” Likewise, Qwest believes that the Appellate Court ruling makes it clear that adjacent collocation is “on the LEC’s premises” and thus should not be included as part of its definition that it can take place “nearby an ILEC’s premises.” Consequently, Qwest recommends that the definition be changed to read:

(1)(b) “Collocation” means the ability of a CLEC to place equipment within or upon an ILEC’s premises.

Collocation Installation Intervals

Staff recommends a 45-day installation interval for collocation arrangements. As the basis for the 45-day interval, Staff states that “Qwest Corporation has already offered this interval to one CLEC (see agreement between Qwest Communications and Rhythms Links, Inc., in the U S WEST/Qwest Merger case). Therefore, Staff believes that the 45-day interval is feasible.”¹¹ Qwest agrees that the Rhythms and U S WEST Stipulation includes 45 day interval for physical

¹⁰ Id. at 425.

¹¹ August 9, 2000, Open Meeting Staff Memorandum in support of CR-102.

collocation (both caged and cageless), but the 45 day interval was explicitly tied to receiving annual forecasts, updated quarterly. Furthermore, the Stipulation included a provision that if any of the detailed information required to adequately plan for collocation is missing from the forecasts, the intervals revert to those contained in the interconnection agreements. The information that was required to be included in the collocation forecasts in accordance with the Stipulation is listed below:¹²

- Month each application will be sent
- Earliest targeted in-service date of each application
- The central office(s), by common name for each application
- Collocation type for each application
- For each physical collocation application, the approximate square footage required
- For each cageless or virtual collocation, number of bays/panels required
- For each cageless or virtual collocation, a high-level listing of the equipment to be installed
- The number of amps required for each application
- Total number of DSO, DS1, DS3, OCN, finished services and termination for each application
- Heat dissipation of equipment to be installed
- Type of Termination required for each level of connection. For new collocations indicate the numbering requested on each block or panel (100 count increments, 24 count increments, etc.), and projected timing of use and quantity for terminations.

Qwest submits that the rules should either include the forecast requirements contained in the stipulation as a prerequisite for a 45-day interval, or should revert to the standard 90 day interval that currently exists. Qwest cannot overemphasize that it would be impossible for it to meet a 45 day collocation interval without the detailed planning information that was included as a ‘most necessary’ condition and requirement of the U S WEST/Rhythms Stipulation.

Likewise, Qwest believes that the 90 day interval contained in Staff’s Rules for those

¹² Stipulation Between Rhythms and U S WEST, April 20, 2000; A. 1., 2.; pages 1-2.

situations where extraordinary circumstances exist is too limited. By their very nature, extraordinary circumstances do not lend themselves to resolution within specific timeframes. Furthermore, without the detailed information required in the U S WEST/Rhythms Stipulation, Qwest has very little lead time in which to react to such situations. Consequently, Qwest submits that time intervals for extraordinary circumstances be dealt with on an individual case basis and not the specified 90 day timeframe contained in Staff's Rules.

Waiver of Nonrecurring Collocation Charges for Failure to Meet Installation Intervals

Staff's Rules contain a provision that requires the incumbent to waive 10% of the nonrecurring charges for the collocation installation for each week past the required completion date that the collocation is not complete. This provision should be removed from the rules. This requirement constitutes either a penalty on the ILEC, or an award of liquidated damages to the CLEC requesting the collocation. Neither a penalty assessment nor an award of liquidated damages is permissible or appropriate in this context.

As the Commission is aware, the nonrecurring charges for collocation are not insignificant. In Docket No. UT-003013, in hearings in August 2000, Qwest presented testimony and evidence supporting a nonrecurring charge for caged collocation of approximately \$53,000 and for cageless collocation of approximately \$31,000. These are cost-based prices, and reflect the costs that Qwest actually incurs in the provisioning of the collocation space.

Staff's proposal would credit 10% of the nonrecurring charge to the CLEC if Qwest were one week late delivering the space. A penalty of this amount (\$3,000-\$5,000 per week) far

exceeds the amount that the Commission is authorized to impose under RCW 80.04.405.¹³

Additionally, even if such a penalty were authorized, there is no basis to predetermine in the rule that there should be strict liability for the delay, without regard to the circumstances which caused the delay.

One might argue that the waiver of the nonrecurring charge is not strictly a penalty because the amount is remitted to the CLEC, not the State. However, even if this is so, it merely converts the “penalty” into an assessment of liquidated damages. Liquidated damages are generally defined as damages for breach by either party in an amount agreed to by both parties to a contract. The amount must be reasonable in light of the anticipated or actual harm caused by the breach, as well as the difficulty of proof of loss and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. An unreasonably large liquidated damages amount is void as a penalty. In this case, it is simply impossible to agree that \$3,000-\$5,000 per week is a reasonable amount, especially if the installation interval is 45 days, which Qwest has explained is simply too short unless there are significant additional conditions imposed on the CLEC with regard to forecasting and ordering the collocation.

ILEC Requirement to Petition Commission Regarding CLEC Challenges on Space Denial

Section (4) (c) of Staff’s Rules states that “[i]f the CLEC notifies the ILEC that it contests the denial of an order for collocation, the ILEC must, within twenty-five (25) calendar days of the

¹³ Under RCW 80.04.405 the Commission has authority to impose penalties of up to \$100 per violation for violations of Commission rules or laws. Under RCW 80.04.380, et seq., violations may be penalized up to \$1,000 per occurrence, but actions to recover those penalties must be brought in superior court, not before the Commission. RCW 80.04.400.

notification, file a petition asking the Commission to determine that the space requested but the CLEC is not available.”

Qwest respectfully suggests that this provision be changed to retain the current practice. Under the current practice, Qwest files a notice with the Commission every time it denies a collocation application due to lack of space. The current practice does not require Qwest to file a formal petition, but rather requires the CLEC who contests the denial to file a complaint with the Commission. The incumbent would then file an answer, and the matter can be set for the appropriate process.

Qwest notes that the industry has over four years of experience with collocation applications and denials of space. The current practice seems to have worked during this time, and there is no rationale offered for shifting the process to require a formal petition by the ILEC, especially when the ILEC already provides the Commission and the CLEC with notification of the denial of space. Indeed, the rule is vague as to when the ILEC would be required to file a petition. Under the proposed rule, the CLEC clearly has some obligation to notify the ILEC that it disagrees with the denial of space. However, it is unclear from the language in the rule what the CLEC must do to “notif[y] the ILEC that it contests the denial of an order for collocation”. This alone could lead to misunderstandings and disputes about whether or how the CLEC had notified the ILEC, thereby triggering the ILEC obligation to file a petition with the Commission. For example, an ILEC may deny space for caged collocation but offer space for cageless. If the CLEC states that it will accept the cageless installation but believes that space for a 10x10 cage could be made available, is that a situation in which the CLEC has notified the ILEC that it contests the denial of space? It is much simpler, and more obvious to the affected parties, if the

CLEC simply petitions the Commission for relief or enforcement, thereby starting the formal process.

Summary

In summary, Qwest applauds Staff on its targeted approach to collocation rules, given the fact that extensive collocation rules already exist as a result of numerous state and federal rulings on the subject. Consequently, Qwest's comments go to the substance rather than the scope of Staff's Rules.

In order to be consistent with the recent D.C. Circuit Court Ruling and interpretation of the FCC's Order¹⁴ on the subject, Qwest proposes that Staff modify its definition of collocation to remove the reference and inference that collocation be provided ". . . nearby an ILEC's premises." The Appellate Court makes it clear in its ruling that the FCC's "adjacent collocation" are on LEC premises and not nearby the LEC premises.

Qwest also believes that the Staff proposed rules regarding provisioning intervals for collocation either need to include the necessary forecasting provisions that were a precondition for a 45-day interval in the U S WEST/Rhythms Stipulation or be changed back to the standard collocation provisioning interval currently offered by Qwest. Qwest maintains that it would be virtually impossible for it to meet the provisioning intervals without the necessary information.

Qwest believes that Staff should eliminate the provision in its rules which requires the

¹⁴ *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, 14 FCC Rcd 4761 (1999) (Advanced Services Order).

waiver of 10% of the nonrecurring charges for collocation installation for each week past the required installation interval that collocation is not complete. Qwest believes that such a penalty assessment, or liquidated damage, is neither permissible nor appropriate. There is no objective way to determine if the penalty is warranted, and the amount of the penalty far exceeds the amount that the Commission is authorized to impose under RCW 80.04.405.

Finally, Qwest believes that the Staff Rules should not modify the existing process for petitioning the Commission to investigate collocation space denials. There is no evidence that the current process is not working, and Staff's Rules are not clear on how a CLEC would notify an ILEC that it contests the collocation space denial.